OAH 8-1900-19710-1
Governor's Tracking Number AR 279

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Proposed Amendments to the Rules of the Department of Labor and Industry, Labor Standards Unit, Relating to Prevailing Wage Determinations, Master Job Classifications, Minnesota Rules Parts 5200.1030 to 5200.1100.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

A hearing concerning the above rules was held by Administrative Law Judge Eric L. Lipman at 9:30 a.m. on Friday, July 25, 2008, in the Minnesota Room of the headquarters of the Department of Labor and Industry (Department or Agency) at 443 Lafayette Road North, St. Paul, Minnesota 55155.

William A. Bierman, Jr., Esq., 443 Lafayette Road North, St. Paul, MN 55155, appeared at the rule hearing on behalf of the Department. The members of the Agency's hearing panel were William A. Bierman, Jr., Attorney for the Department, Erik Oelker, Senior Labor Investigator, Michelle Dreier, Senior Labor Investigator, Roslyn Wade, Director of Labor Standards and Apprenticeship, and Brian Zaidman, Senior Research Analyst.

Approximately 41 people attended the hearing and signed the hearing register. The proceedings continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed amendments to these rules.

After the hearing ended, the Administrative Law Judge kept the administrative record open for another twenty calendar days – until August 14, 2008 – to permit interested persons and the Department to submit written comments. Following the initial comment period, pursuant to Minnesota law,[1] the hearing record was open an additional five business days so as to permit interested parties and the Agency an opportunity to reply to earlier-submitted comments. The hearing record closed for all purposes on August 21, 2008.

The public hearings and this Report are part of a larger series of processes under the Minnesota Administrative Procedure Act. These processes must be completed before an Agency is authorized to adopt rules.

[1] Minn. Stat. § 14.15, subd. 1.

Among the protections provided to the public under the Minnesota Administrative Procedure Act are the requirements that the Agency demonstrate that the proposed rules are necessary and reasonable, and that any changes the Agency may have made to the proposed rules after they were initially published are not substantially different than what the Agency originally proposed.[2] The rulemaking process also provides for public hearings, at which the public may review, discuss and critique the proposed rules.

NOTICE

The Department must wait at least five working days before taking any final action on the rules. During that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minnesota Rules, part 1400.2100, and Minnesota Statutes, section 14.15, subdivisions 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of actions that will correct the defects. If the Department elects to make any changes to the rule, it must resubmit the rule to the Chief Administrative Law Judge for a review of those changes before adopting the rule.

However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Department may either follow the Chief Administrative Law Judge's suggested actions to cure the defects or, if the Department does not elect to follow the suggested actions, it must submit the proposed rule to the Legislative Coordinating Commission, and the House of Representatives and Senate Policy Committees with primary jurisdiction over state governmental operations for the advice of the Commission and Committees.

When the rule is filed with the Secretary of State by the Office of Administrative Hearings, the Department must give notice to all persons who requested that they be informed of the filing.

SUMMARY OF CONCLUSIONS

The Department has established that it has the statutory authority to adopt the proposed rules and that the rules are necessary and reasonable, with six exceptions as detailed in Findings 71, 99, 107, 118 and 125.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

[2] Minn. Stat. §§ 14.05, 14.131, 14.23, 14.24 (2006).

FINDINGS OF FACT

I. Background on the Proposed Rules

1. In 1973, Minnesota enacted its own prevailing wage law modeled after the Federal Davis-Bacon Act. The Minnesota Prevailing Wage Act is a minimum wage law that applies to construction projects financed in whole or in part by state funds. The Minnesota Prevailing Wage Act is codified at Minnesota Statutes §§ 177.41 – 177.44. The accompanying administrative rules are set forth at Minnesota Rules 5200.1000 - 5200.1120.

2. Under the Minnesota Prevailing Wage Act, the Department establishes the labor classifications for workers and determines the prevailing wage rate for the classifications. The classes of labor are listed under the Master Job Classifications at Minnesota Rules 5200.1100. Prevailing wage rates are determined by the Department by the use of wage surveys that it compiles for each of ten defined areas of the state. The prevailing wage rate to be paid is the surveyed rate paid to the largest number of workers engaged in the same class of labor within a specified area.

3. This rulemaking proceeding involves a proposal by the Department to amend and revise rules relating to the master job classifications, which the Department establishes for making prevailing wage determinations. The purpose of the rule amendments is to update the master job classifications to reflect changes in construction techniques, practices, and equipment that have developed since the classifications were last updated approximately 10 years ago.[3] In the main, the proposed rule amendments apply to highway and heavy construction, as well as commercial construction. The Department has proposed amendments clarifying when the Commissioner must determine whether work performed by a class of labor not named in the master job classifications is included in an existing class, adding a general class of labor, and clarifying the minimum number of hours of work required for a worker to be included in the wage survey process.[4] The proposed amendments also create separate classifications for certain highway-heavy and commercial construction duties; create new classifications or amend existing classifications relating to landscaping and seeding, and painting and striping of roads; and create new classifications or amend classifications relating to warning lights, warning signs, and other traffic control devices. The proposed rule amendments also create new classifications or amend existing classifications for survey workers, quality testers, articulated haulers, and off-road trucks.[5]

4. The master job classifications were last revised and amended in 1997. At that time, the Department used the same six groups of power equipment to cover both highway-heavy construction, and commercial construction. However, changes in

[3] SONAR at 8.

[4] SONAR at 2.

[5] SONAR at 4.

technology and construction practices over the years, as well as the differences between highway-heavy construction and commercial construction, have necessitated updating the rules. In particular, the differences between the types of power equipment used in highway-heavy construction and those used in commercial construction, as well as the differences in pay for equipment operators, has grown over the years.[6] According to the Department, there is a clear need based on changes in construction practices to create a set of classifications for commercial power equipment operators. The equipment is more specialized and also more technologically advanced with features such as remote control operation and GPS controlled operation.[7]

5. To address these differences and provide greater clarity and precision, the proposed rules separate power equipment operator classifications by specific construction type. Under the proposed rules, the Department will survey two separate sets of power equipment classifications, one for highway-heavy equipment operators and one for commercial type construction operators.[8]

II. Milestones in this Rulemaking Proceeding

6. The proposed rules were developed in cooperation with the Minnesota Department of Transportation. Together, the departments established an advisory committee to gather input on the proposed rules from affected parties. The advisory committee was made up of members of the construction industry, including prime contractors, subcontractors, material suppliers and trucking firms, unions, employees and other affected parties to determine the best way to address the master job classification amendments involved in this rulemaking. Also included were representatives of surveyors, landscapers, traffic control companies, and pavement marking/painting contractors. Department staff attended all advisory committee meetings to be available to answer questions and to listen to committee concerns.[9]

7. In 2002, the Advisory Committee held public hearings at which it took oral testimony from committee members and members of the audience. Written comments were also collected at the end of each hearing and the committee accepted comments submitted by mail. The Advisory Committee met on February 28, 2002, March 28, 2002, and April 30, 2002. The Department considered all comments and information submitted with respect to the proposed rules.[10]

8. A Request for Comments was first published on the proposed rules in the *State Register* on September 20, 1999.[11] It was mailed to all persons on the

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[6] SONAR at 3-4.

[7] SONAR at 9.

[8] SONAR at 3-4.

[9] SONAR at 14.

[10] SONAR at 14-15.

[11] 24 S.R. 396.

Department's rulemaking mailing list. Subsequent Requests for Comments were published in the *State Register* on July 30, 2001,[12] October 25, 2004,[13] and July 24, 2006.[14] In addition to being mailed to all persons on the Department's rulemaking list, the Requests for Comments were also sent to all persons who requested information about the proposed rules from either the Agency or the Department of Transportation, as well as contractors who sought information about the rulemaking from the Department of Transportation's Labor Compliance Unit. All comments received in response to the Requests for Comments were considered by the Department in preparing the proposed rule amendments.[15]

9. Drafts of the proposed rules and the Request for Comments have been posted on the Department's website since July 2006.[16]

II. Rulemaking Legal Standards

10. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the Agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the Agency may rely upon materials developed for the hearing record,[17] "legislative facts" (namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy,[18] and the Agency's interpretation of related statutes.[19]

11. A proposed rule is reasonable if the Agency can "explain on what evidence it is relying and how the evidence connects rationally with the Agency's choice of action to be taken."[20] By contrast, a proposed rule will be deemed arbitrary and capricious where the Agency's choice is based upon whim, devoid of articulated reasons or "represents its will and not its judgment."[21]

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[12] 26 S.R. 107.

[13] 29 S.R. 454.

[14] 31 S.R. 91.

[15] SONAR at 15.

[16] SONAR at 16.

[17] *See, Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. App. 1991).

[18] *Compare generally, United States* v. *Gould,* 536 F.2d 216, 220 (8th Cir. 1976).

[19] *See, Mammenga v. Board of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

[20] *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

[21] *Compare, Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*; 312 Minn. 250, 260-61, 251 N.W.2d 350, 357-58 (1977).

12. An important corollary to these standards is that when proposing new rules an Agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the Agency is a rational one.[22] Thus, while reasonable minds might differ as to whether one or another particular approach represents "the best alternative," the Agency's selection will be approved if it is one that a rational person could have made.[23]

13. Lastly, in these proceedings the Administrative Law Judge conducts a review of the Agency's compliance with the procedural requirements for promulgating new rules. Among the inquiries that are made are: Whether the Agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the Department has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.[24]

14. The Department prepared a Statement of Need and Reasonableness ("SONAR") in support of the proposed rules. At the hearing, the Agency primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by members of the Agency's Panel and supporting witnesses during the public hearings.

15. The Department has suggested three amendments to the proposed rules in response to stakeholder comments. Accordingly, because these later modifications followed the publication of the proposed rules in the State Register, Minn. Stat. § 14.05, subd. 2, further requires that the Administrative Law Judge determine whether the new language is substantially different from that which was originally proposed.[25]

16. Additionally, Minn. Stat. § 14.05, subd. 2 instructs that a later modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the . . . notice of hearing and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question." In reaching a determination regarding whether modifications are substantially different, the Administrative Law Judge is to consider whether "persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests," whether "the subject matter of the rule or issues determined by the rule are different from the subject matter or

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[22] *Peterson v. Minn. Dep't of Labor & Indus*., 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).

[23] *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

[24] *See,* Minn. R. 1400.2100 (2007).

[25] *See* Minn. Stat. §§ 14.15, subd. 3, and 14.05, subd. 2 (2006).

issues contained in the . . . notice of hearing," and whether "the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing."[26]

III. Compliance with Procedural Rulemaking Requirements

17. On May 29, 2008, the Agency requested the scheduling of a hearing regarding the proposed rules and approval of the Additional Notice Plan. The Department filed the following documents with the Chief Administrative Law Judge at that time: A copy of the draft Notice of Hearing proposed to be issued; a copy of the proposed rules as certified by the Revisor of Statutes; and a draft of the SONAR.

18. On June 4, 2008, the Department submitted an amended Notice of Hearing.

19. On June 5, 2008, Administrative Law Judge Eric L. Lipman approved the Notice of Hearing and Additional Notice Plan, contingent upon the addition of the Chairwoman of the Minnesota State Bar Association's Construction Law Section to the mailing list.[27]

20. On June 19, 2008, the Agency mailed a copy of the SONAR to the Legislative Reference Library as required by law,[28] and mailed copies of the Notice of Hearing, proposed rules, and SONAR to the chairs, chief authors and ranking minority members of designated legislative committees.[29]

21. On June 19, 2008, the Agency mailed the Notice of Hearing and a copy of the proposed rules to all persons and associations who had registered to be on the Agency's rulemaking list.[30]

22. On June 23, 2008, a copy of the proposed rules and the Notice of Hearing were published in the State Register.[31]

23. On the day of the hearing,[32] the Agency placed the following documents into the record:

(a) the Request for Comments as published in the *State Register* on July 24, 2006 (Exhibit A);

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[26] Minn. Stat. § 14.05, subd. 2 (2006).

[27] Ex. K-4.

[28] Ex. E.

[29] The Agency sent materials to the leadership of the Economic Development Budget Division, Business Industry & Jobs Committee, Higher Education and Workforce Development Policy and Finance Division, and Commerce and Labor Committee. *See*, Ex. K-1.

[30] Ex. G.

[31] 32 S.R. 2253.

[32] *See,* July 25, 2008 Hearing Transcript at 12.

(b) the Proposed Rules as approved by the Revisor of Statutes, dated June 2, 2008 (Ex. C);

(c) the SONAR (Ex. D);

(d) the Agency's Certificate of Mailing the SONAR to the Legislative Reference Library (Ex. E);

(e) the Notice of Hearing as published in the State Register (Ex. F);

(f) the Agency's Certificate of Mailing the Notice of Hearing to the Rulemaking Mailing List and its Certificate of Accuracy of the Mailing List (Ex. G);

(g) the Agency's Certificate of Mailing the Notice of Hearing Pursuant to the Additional Notice Plan with attached mailing lists (Ex. H);

(h) written comment received from the American Council of Engineering Companies dated July 24, 2008 (Ex. I);

(i) the Agency's Certificate of Sending the Notice, SONAR, and Proposed Rules to Legislators (Ex. K-1);

(j) the Agency's Certificate of Posting the Notice of Hearing on its Website Pursuant to the Additional Notice Plan (Ex. K-2);

(k) a copy of the Agency's May 23, 2008, letter to the Department of Finance and the response from the Department of Finance dated June 13, 2008 (Ex. K-3);

(l) a copy of Administrative Law Judge Eric Lipman's letter to the Agency approving its Additional Notice Plan dated June 5, 2008 (Ex. K-4);

(m) copies of transcripts of the Agency's Advisory Committee meetings that took place on February 28, 2002, March 28, 2002, and April 30, 2002 (Ex. L 1-3);

(n) a copy of the Federal (USDOL) Prevailing Wage Determination showing "grouped" power operator classifications (Ex. M-1);

(o) the Agency's 2007 Highway and Heavy Construction Prevailing Wage Determinations by 10 Regions (Ex. M-2);

(p) the Agency's 2007 Commercial Construction Prevailing Wage Determinations for 87 Counties (Ex. M-3);

(q) copies of written comments the Agency received in 2006 after publishing its Request for Comments on July 24, 2006 (Ex. N); and

(r) written comments on the proposed rules received prior to and during the hearing. (Exs. 1-4)

24. Except as noted in Finding 30 below, the Administrative Law Judge concludes that the Agency has met all of the procedural requirements established by statute and rule.

IV. Statutory Authority

25. The Department states that it has both general and specific statutory authority to adopt rules. Minnesota Statutes § 175.171(2) grants the Department general authority:

> . . . to adopt reasonable and proper rules relative to the exercise of its powers and duties, and proper rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings . . .

26. As specific statutory authority for the proposed rules, the Department cites Minn. Stat. § 177.43, subdivision 4, which directs the Department to determine prevailing wage rates for all trades and occupations on projects other than highway; and Minn. Stat. § 177.44, subdivisions 3 and 4, which direct the Department to investigate and determine the classes of labor and prevailing wage rates for highway construction projects.

27. The Department also cites Minn. Stat. § 177.28, subd. 1 (2007) for general rulemaking authority to adopt these rules. This section states that:

> [t]he commissioner may adopt rules, including definitions of terms, to carry out the purposes of section 177.21 to 177.44, to prevent the circumvention or evasion of those sections, and to safeguard the minimum wage and overtime rates established by 177.24 and 177.25.[33]

28. The Administrative Law Judge finds that the above statutory provisions grant the Department the authority to adopt the proposed rules.

V. Impact on Farming Operations

29. Minn. Stat. § 14.111 imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an Agency provide a

[33] *See*, Minnesota Laws 2007, Chapter 135, Article 3, Section 9.

copy of any such changes to the Commissioner of Agriculture at least thirty days prior to publishing the proposed rules in the State Register.

30. The proposed rules do not impose restrictions or have a direct impact on fundamental aspects of farming operations.[34] The Administrative Law Judge finds that the proposed rule changes will not affect farming operations in Minnesota; the Department's failure to address this requirement in its SONAR was a harmless error and that no additional notice was required.

VI. Additional Notice Requirements

31. Minn. Stat. § 14.131 requires that an Agency include in its SONAR a description of the efforts it made to provide notification to persons, or classes of persons, who may be affected by the proposed rule; or alternatively, the Agency must detail why these notification efforts were not made. The Agency submitted an additional notice plan to the Office of Administrative Hearings, which was approved on June 5, 2008.[35] Pursuant to the plan, the Agency mailed the Notice of Hearing and proposed rules to four lists in addition to its official rulemaking list: the "Prevailing Wages" list; the "Associations" list, which also received a one page new release requesting that the release be placed in the association's email notification or publication for its members; a mailing list of persons or groups who submitted comments; and the Agency's "Request for Comments" mailing list.[36] The combined lists consisted of approximately 1,600 names of individuals, contractors, companies, and groups that received notice of the proposed rule amendments form the Agency. In addition, the Agency posted the Notice of Hearing and proposed rules on its website.[37]

32. The Administrative Law Judge finds that the Agency fulfilled its additional notice requirement.

VII. Statutory Requirements for the SONAR

A. Cost and Alternative Assessments in the SONAR

33. Minn. Stat. § 14.131 requires an Agency adopting rules to include in its SONAR:

a. a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the

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[34] *See also, n the Matter of the Proposed Amendments to Rules Governing Prevailing Wage Determinations, Minn. Rules Part 5200.1000 – 5200.1120,* OAH Docket No. 3-1900-10549-1, slip op. at 12 (1996) ("The proposed rules will not affect farming operations and no additional notice is required") (http://www.oah.state.mn.us/aljBase/19000549.rr.htm).

[35] Ex. K-4.

[36] SONAR at 15-16. *See*, Ex. H.

[37] Ex. H and Ex. K-2.

costs of the proposed rule and classes that will benefit from the proposed rule;

b. the probable costs to the Agency and to any other Department of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;

c. a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;

d. a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the Agency and the reasons why they were rejected in favor of the proposed rule;

e. the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses or individuals;

f. the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses or individuals; and

g. an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

34. With respect to the first requirement, the Department identified in its SONAR the following classes of affected persons: highway-heavy and commercial construction contractors and subcontractors; construction workers including independent truck owner-operators; companies with multiple trucks for hire (MTOs); truck drivers; the owners of public works projects; and Minnesota taxpayers.[38]

35. The Department states that contractors and subcontractors which are not currently paying prevailing wages, because the duties are misclassified in lower wage classifications, will bear some costs when a new classification is added. However, the Agency points out that those increased labor costs will most likely be passed on to the state and local governments as part of the cost of the construction project. In addition, because the amount of work that is not covered by existing classifications is small, the Agency asserts potential increased labor costs will be minimal.[39]

[38] SONAR at 6.

[39] SONAR at 5 and 8.

36. The Department states that construction workers and truck drivers in both highway-heavy and commercial construction will benefit from the proposed rule amendments – presumably, because these workers will receive higher wages**.** In addition, contractors and subcontractors who bid on public works projects will benefit because the proposed rules clarify who must be paid prevailing wages making the bidding process more uniform and equitable. Lastly, the Agency asserts that local economies will benefit from the likely increase in spending by construction employees. As the Department reasons, a rise in wages will benefit communities increasing the ability of workers to purchase goods and services and by reducing demand upon social services programs.[40]

37. With respect to the second requirement, the Agency estimates that the costs it will incur in enforcing the proposed rules will be minimal. The Agency states that it will need to revise its computer system to accommodate the new classifications and it will have to survey a larger number of labor classes. The Agency believes that the total cost of making the computer program revisions and surveying a larger number of classes will be $5,000 per year or less. The Agency anticipates negligible cost increases with respect to data entry, mailing or other administrative tasks as a result of these proposed rules. The Agency expects to achieve overall future cost savings in enforcement actions because it anticipates the proposed rules will clarify master job classification issues that are often the subject of contested enforcement actions.[41]

38. The Agency states that Minnesota Department of Transportation will incur additional administrative costs due to the increase in the number of classifications. However, the Agency asserts that the Department of Transportation should achieve overall cost savings in enforcement because the proposed rules should clarify labor classifications, which are often at issue in costly contested enforcement actions.[42] The Agency does not anticipate that the proposed rules will have any measureable effect on state revenues.[43]

39. With respect to the third requirement**,** the Agency asserts that there are no less costly or less intrusive methods for achieving the purpose of the proposed rule amendments, which is to update the master classifications to reflect changes in construction techniques, practices, and equipment. The proposed rule amendments do not impose additional burdens on contractors or companies working on publicly-financed construction projects. Contractors or others who participate in the prevailing wage survey will still need to determine under which master job classification to report each worker. Although there will be a larger number of classifications to use, the Agency asserts that it should be clearer which classification applies to which type or work.[44]

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[40] SONAR at 6.

[41] SONAR at 6-7.

[42] SONAR at 7.

[43] *Id*.

[44] SONAR at 8.

40. With respect to the fourth requirement, the Agency states that it considered case by case enforcement as an alternative method for achieving the purpose of the proposed rules. The Minnesota Department of Transportation has the authority to enforce prevailing wage statutes and existing rules on a case by case basis. However, the Department rejected this method because, unlike adopting rules, it does not affect all members of the industry uniformly and it is much more costly than rulemaking. The Agency also notes that the Department of Transportation has attempted in the past to provide "contract guidelines" in bidding procedures as an alternative method for updating and clarifying the classifications. However, due to the general applicability and future effect of these guidelines, Minnesota courts have consistently ruled that these guidelines are unpromulgated rules and unenforceable. Given the courts' rulings and the cost of litigation, the Agency rejected the provision of guidelines as an alternative method.[45] Moreover, the Agency states that members of all segments of the construction industry expressed the desire for adoption of rule amendments to clarify prevailing wage classifications.[46]

41. With respect to the fifth requirement, the Agency states that the proposed rule amendments are not expected to have a significant impact on construction costs covered by the prevailing wage laws. The Agency maintains that it is not expanding the scope of coverage of the prevailing wage law so much as it is reorganizing and updating existing classifications. While the proposed rules do identify some new job classes, the rules primarily regroup existing classes into new master job classification groups. Some of the new classes will receive their own prevailing wage rate, and other classes will become part of power equipment operator job groups that will receive one group wage rate. According to the Agency, most of the duties covered under the new job classifications were earlier covered by the prevailing wage rules – although under different classifications. For example, the new laborer job classes (110-112) have been enforced for highway and heavy construction projects using the existing prevailing wage rate for "common laborer." Likewise**,** wages for work performed under the proposed new special equipment operator classes (201-205) have been enforced at the rate for drivers "two axle unit," and wages for paint truck drivers (205) has been enforced under the existing class for "painter."[47]

42. The Agency maintains that the changes to the job classifications are expected to have little or no measureable impact on construction costs covered by the prevailing wage laws. However, the total fiscal impact of the proposed rules is difficult to estimate because the Department relies upon voluntary surveys to set the prevailing wage rates. Prevailing wage rates are based on the modal wages collected by the annual prevailing wage survey. It is not known how many survey responses will identify the new job classes, or whether their wages will differ from the wages of the job classifications under which they may have been covered. It is also not known whether union wage rates are already being used for the work. The Agency concedes, however,

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[45] SONAR at 9.

[46] *Id*.

[47] SONAR at 10.

that the regrouping of job classifications will lead to some job classes having higher prevailing wages than under the current system – indeed, it points to this effect as among the benefits of the proposed rules.[48]

43. The Minnesota Department of Finance likewise concluded after reviewing the proposed rules that "there will eventually be a fiscal impact to local units of government that engage in state funded construction activities that employ affected classes of workers, but the impact is impossible to quantify."[49]

44. According to the Agency, determination of the fiscal impact of new prevailing wage rates for certain job classes is dependent on at least three variables: (1) the percentage of total construction costs that are labor costs; (2) the percentage of labor costs (or hours) that involve the new job classes; (3) the percentage increase in labor costs for the work done in the new job classes. Ranges for each of these variable percentages were used to calculate percentage cost increases in construction costs. The impact of the wage changes is calculated as: (cost of construction) x (1) x (2) x (3).[50]

45. Based upon the 2002 Economic Census, the Office of the Legislative Auditor estimated that, nationwide, labor costs represent approximately 25 percent of total construction costs.[51]

46. The record does not include data as to the number of hours of work that will be performed under the new classifications or the share of the total labor costs that the new job classes will represent.[52] Indeed, these figures are likely to vary considerably between projects. In its SONAR, the Department provided estimated impacts of the new labor classes, if one were to assume that the new classes represented one, five or 10 percent of labor costs.[53]

47. The Department conducted a "worst-case scenario" analysis of the 2007 prevailing wage survey results for common laborers and it showed that if all the reported laborers who received wages lower than the mode were to be paid at the modal rate, there would be a 22 percent increase in wage costs for laborers. This would amount to an increase from $30 per hour to $36 per hour. Similarly, a 30 percent increase would raise labor costs from $30 per hour to $39 per hour, and a 40 percent increase would raise labor costs from $30 per hour to $42 per hour.[54]

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[48] SONAR at 6, 9, 10 and 13.

[49] Ex. K-3.

[50] SONAR at 11.

[51] *"Prevailing Wages*," Minnesota Office of the Legislative Auditor, Program Evaluation Division, at 75-77 (February 2007); SONAR at 11.

[52] SONAR at 11.

[53] SONAR at 10.

[54] SONAR at 11.

48. According to the Department's analysis: If labor costs accounted for 30 percent of the total construction cost, and 5 percent of the labor costs was for work performed by new labor classes, and these new job class wages increased an average of 30 percent due to the prevailing wage, a $1 million construction project would now cost $1,004,500.[55]

49. In 2006, highway and heavy construction projects administered by MnDOT were estimated at $2 billion and state-financed commercial construction contracts were estimated at $0.8 billion.[56] With this total amount of contracting activity, the potential effects of higher wage rates could be quite large. According to the Agency's analysis, the effect of the rule changes upon $2 billion of highway and heavy construction could range between $800,000 and $32 million in added costs. The effect upon $0.8 billion of commercial construction could range between $300,000 and $12.8 million in new costs.[57]

50. With respect to the sixth requirement, the Agency states that the probable costs of failing to adopt the proposed rules is that more workers will not be paid the correct prevailing wage rate on publicly-financed projects. The Agency points out that the Minnesota Department of Transportation has been collecting underpaid or unpaid prevailing wages on behalf of workers of approximately $1,000,000 per year in recent years. Another probable consequence of not adopting the rules will be a continuation of some confusion as to the proper classification and pay rates for workers, particularly with respect to power equipment operators and those workers in the new classifications proposed by the rules.[58] Lastly, the Agency asserts that a probable consequence of failing to adopt the proposed rules will be increased costs to the state for case-by-case enforcement actions.[59]

51. With respect to the seventh requirement, the Agency identifies in its SONAR several differences between Minnesota's prevailing wage law and the federal Davis-Bacon Act. First, Minnesota's prevailing wage rates are set by the arithmetic mode and the federal prevailing wage rates are set by a weighted average method. Minnesota's process requires that at least two projects in an area report a class of labor in order to certify a prevailing wage rate. The federal process allows for job specific wage surveys, which Minnesota does not. The federal process also allows for the creation of new prevailing wage classifications outside of the federal rulemaking process, where Minnesota requires the Department to create classifications by rulemaking. Lastly, the federal process has thousands of job classifications and Minnesota has a far fewer number – only a few hundred separate classifications. The

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[55] *Id.*.

[56] The estimated highway and heavy project costs were supplied by MnDOT and the estimated commercial construction contracts were based on the 2006 Capital Budget Bill and a cost breakdown provided by the Minnesota Department of Finance. SONAR at 12.

[57] SONAR at 12.

[58] SONAR at 13.

[59] *Id.*

Agency contends that by keeping the number of job classifications down to a manageable number it can better avoid "missing" rates – namely, a job classification as to which there is not up-to-date wage survey information.[60]

B. Performance-Based Regulation

52. Minn. Stat. § 14.131 requires that an Agency include in its SONAR a description of how it "considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002." Minn. Stat. § 14.002 states further that "whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the Agency's regulatory objectives and maximum flexibility for the regulated party and the Agency in meeting those goals."[61]

53. The Department asserts in its SONAR that the goal of the proposed rules is to provide guidance to contractors as to which activities are covered by the prevailing wage rates and, in so doing, "level the playing field" between union and non-union contractors in bidding for public works projects. The Department states that in order to achieve maximum flexibility for the regulated parties, it worked with an Advisory Committee made up of construction industry members, including: contractors, subcontractors, material suppliers, trucking firms, unions, employees and other affected parties. Together Agency staff and Advisory Committee members discussed the best ways to address master job classifications.[62]

54. The Agency states that, in comparison to case by case enforcement, the proposed rules promote superior achievement in meeting the prevailing wage law's regulatory objective of paying prevailing wages.[63]

55. The Administrative Law Judge concludes that the Department has sufficiently assessed the performance impact of the proposed rules and has satisfied the requirements of Minn. Stat. § 14.131.

C. Consultation with Commissioner of Finance

56. Under Minn. Stat. § 14.131, the Agency is also required to "consult with the commissioner of finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government."

57. The Department consulted with the Department of Finance, and in a response dated June 13, 2008, the Department of Finance concluded that "there will eventually be a fiscal impact to local units of government that engage in state funded

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[60] SONAR at 13-14.

[61] Minn. Stat. § 14.002 (2006).

[62] SONAR at 14.

[63] SONAR at 15.

construction activities that employ affected classes of workers, but the impact is impossible to quantify."[64]

58. The Administrative Law Judge concludes that the Agency has met the requirements (set forth in Minn. Stat. § 14.131) for consultation with the Commissioner of Finance regarding the fiscal impact and benefits of the proposed rules.

D. Compliance Costs to Small Businesses and Cities

59. Under Minn. Stat. § 14.127, subd. 1, agencies must "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees."[65] Although this determination is not required to be included in the SONAR, the statute states that the Agency "must make [this] determination . . . before the close of the hearing record" and the Administrative Law Judge must review the determination and approve or disapprove it.[66]

60. In the SONAR, the Department states that it has considered whether the cost of complying with the proposed rules in the first year after the rule takes effect will exceed $25,000 for any small business or small city and has determined that it will not. The Department's determination is based upon its assessment in the SONAR of the probable costs of complying with the proposed rules.[67] The Department asserts that the proposed rule is simply a clarification of the current rules and not an expansion of coverage. According to the Department, small businesses will simply use the new clarified classification rules to determine their labor costs when developing a bid for a project subject to the prevailing wage statute. The Department further states that small cities with less than 10 full-time employees are not generally part of state-aid highway programs and only in rare cases would bear a portion of the state-funded construction project costs. In these rare cases, concludes the Department, any incremental costs would be below the $25,000 threshold.[68]

61. The Administrative Law Judge concludes that the Agency has met the requirements set forth in Minn. Stat. § 14.127 for determining whether the cost of complying with the proposed rules in the first year after the rules take effect, will exceed $25,000 for any small business or small city.

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[64] Ex. K-3.

[65] Minn. Stat. § 14.127 (1) (2008).

[66] Minn. Stat. § 14.127 (2) (2008).

[67] *See,* SONAR at 9-11.

[68] SONAR at 17.

VIII. Analysis of the Proposed Rules

62. This Report is limited to the discussion of the portions of the proposed rules where commentators prompted a genuine dispute as to the reasonableness of the Agency's proposed alternative or otherwise required close examination. Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not necessarily address each comment or rule part.

63. The Administrative Law Judge finds that the Agency has demonstrated by an affirmative presentation of facts the need for and reasonableness of all rule provisions that are not specifically addressed in this Report. Further, the Administrative Law Judge finds that all provisions that are not specifically addressed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.

IX. Rule by Rule Analysis

Minn. R. 5200.1030 – Basis for Highway and Heavy Construction Determinations
Minn. R. 5200.1035 – Basis for Commercial Construction Determinations

64. The Department proposed to modify Minn. R. 5200.1030 as follows:

> If work is performed by a class of labor not ~~defined by~~ set forth in part 5200.1100, Master Job Classifications, the contracting agency shall assign a wage rate and the commissioner of labor and industry shall review and certify the assigned wage rate based on the most similar trade or occupation from the area wage determination. Within 90 days, the Commissioner of Labor and Industry must determine that the work is included in an existing Major Job Classification or initiate the rulemaking procedure so that the classification will be ~~defined~~ set forth in the Master Job Classifications in part 5200.1100.[69]

65. Commentator Michael L. McCain, of the law firm of Seaton, Beck & Peters, asserted that the proposed revisions to these rules were unreasonable because contrary to its duty under the Prevailing Wage Act, the agency purported only to "name," rather than "define" various classes of labor.[70]

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[69] While an earlier version of the Department's rulemaking proposed use of the term "name" in place of the word "define" – in its first round of comments the Department further modified its position to urge use of the words "set forth in" the Major Job Classifications. *Compare, Proposed Permanent Rules Relating to Prevailing Wages*, Revisor No. RD3697 at 1-2 with the *Department's Initial Comments*, at 8-9 (August 14, 2008).

[70] *Compare, e.g.,* Minn. Stat. § 177.4, subd. 3 (2006) ("The Department of Labor and Industry shall conduct investigations and hold public hearings necessary to define classes of laborers and mechanics and to determine the hours of labor and wage rates prevailing in all areas of the state for all classes of labor and mechanics commonly employed in highway construction work, so as to determine prevailing hours of labor, prevailing wage rates, and hourly basic rates of pay").

In the SONAR, the Department asserts the proposed amendments clarify:

> that the Commissioner of Labor and Industry, has an option of determining that work being performed by a class of labor, which somebody claims is not covered by an existing classification, is included in an existing classification. This is an alternative to initiating a rulemaking procedure and is clearly indicated as an option and a duty in the statute in Minn. Stat. § 177.43, subd. 1 with respect state projects generally and Minn. Stat. § 177.44, subd. 1 with respect to highway projects.[71]

66. In the view of the Administrative Law Judge, the Commissioner of Labor and Industry has not been delegated the authority to simply announce that certain work "being performed by a class of labor … is included in an existing classification" and for this announcement to have a binding effect. The statute relied upon by the Department, Minn. Stat. § 177.43, subd. 1, states in relevant part: "a laborer or mechanic may not be paid a lesser rate of wages than the prevailing wage rate in the same or most similar trade or occupation in the area." Similarly, Stat. § 177.44, subd. 1, provides: "The laborer or mechanic must be paid at least the prevailing wage rate in the same or most similar trade or occupation in the area." Neither of these statutes authorizes the "alternative to initiating a rulemaking procedure" for defining the length and breadth of Major Job Classifications, claimed by the Department in its SONAR.

67. Indeed, the Department acknowledges that when state agencies have, in the past, issued "contact guidelines … as an alternative method for updating and clarifying the classifications … Minnesota courts have consistently ruled that these guidelines are unpromulgated rules and unenforceable."[72] Relabeling classification "guidelines" as classification "determinations" would not change the character of these pronouncements or suddenly render them enforceable.

68. Without such a rulemaking alternative appearing in law, in order for a new classification opinion of the Commissioner to have binding effect it must be promulgated as an interpretive rule. The Minnesota Administrative Procedure Act (MAPA) defines a "rule" as:

> every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.[73]

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[71] SONAR at 18 (emphasis added).

[72] SONAR at 9; *see also,* SONAR at 14 ("The federal process also allows for the creation of new prevailing wage classifications outside of the federal rulemaking process. Our prevailing statute and Chapter 14 of Minnesota Statutes do not").

[73] Minn. Stat. § 14.02, subd. 4.

Interpretations of existing rules which "make specific the law enforced or administered by the agency," and are not either long-standing positions of the agency or within the plain meaning of the regulation, are deemed to be "interpretative rules."[74] Like substantive rules, an agency's interpretative rules are valid only if they are promulgated in accordance with MAPA.[75]

69. Significantly, the Court of Appeals' decision in *AAA Striping Service Co. v. Minnesota Dep't of Transportation,*[76] supports this conclusion. In *AAA Striping Service,* the Court addressed the minimum processes that a state contractor might demand as to DOLI's development of prevailing wage classifications. The panel noted:

> To determine whether and to whom DOLI is accountable for decisions not to follow through with rulemaking, we note the importance of classification and the context in which such decisions are made. Workers, labor unions, contractors, subcontractors (including AAA), and perhaps even local units of government, have a substantial interest in the classification process. Fair wages, workers' livelihoods, the financial feasibility of projects, and entrepreneurial opportunities for contractors may be affected by these decisions. The statutes mandate investigation and hearings necessary to define worker classifications. This is strong legislative directive to observe the basics of procedural due process in making classification decisions. We conclude that at a minimum, DOLI should engage in rulemaking as specified in its own regulation, or, in the alternative, make available a reconsideration process with a contested case proceeding when requested by an aggrieved party. . . . To say that the decision to include striper and striper tenders in an existing classification is entirely within the discretion of DOLI, that it can exercise this discretion without a record or a hearing, and that there is no review available is inconsistent with DOLI's own rules, the statutes, and with the principles of procedural due process.[77]

In that case, the Court of Appeals considered and rejected the claim that the Commissioner of Labor and Industry could, by mere announcement alone, place certain work within a given job classification.

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[74] *See, e.g., Cable Communications Bd. v. Nor-West Cable Communications P'ship*, 356 N.W.2d 658, 667 (Minn. 1984) ("Generally, if the agency's interpretation of a rule corresponds with its plain meaning, or if the rule is ambiguous and the agency interpretation is a long-standing one, the agency is not deemed to have promulgated a new rule").

[75] *See, In re Application of Q Petroleum*, 498 N.W.2d 772, 780 (Minn. App.), *review denied* (Minn. 1993) (*citing, Mapleton Community Home, Inc. v. Minnesota Dep't of Human Services*, 391 N.W.2d 798, 801 (Minn. 1986) and *Minnesota-Dakotas Retail Hardware Ass'n v. State*, 279 N.W.2d 360, 364 (Minn. 1979)).

[76] 681 N.W.2d 706 (Minn. App. 2004).

[77] *AAA Striping Service Co.,* 681 N.W.2d at 717 (emphasis added and citations and footnote omitted).

70. Under the terms of the prevailing wage statute, the Commissioner may: (a) define classifications and wage rates before bidding on state contracts occurs; (b) seek to enforce the plain meaning of existing regulations through contested case procedures and (c) undertake rulemaking to establish new major job classifications.

71. What the Department may not do is codify in its regulations a power that the Legislature has not conferred upon it and which the state courts declare to be at odds with the "principles of procedural due process." The proposed revisions to Minn. R. 5200.1030 and Minn. R. 5200.1035 are not approved.

72. At a minimum, the Department will need to remove references to an alternative process for modifying job classifications, short of rulemaking, in any later revisions of Minn. R. 5200.1030 and Minn. R. 5200.1035.

Minn. R. 5200.1100 – Master Job Classifications

73. Mr. McCain, as well as Philip Raines, of the Associated Builders and Contractors of Minnesota, make a broad-based challenge to the proposed revisions to the Master Job Classifications – namely, that the new classifications are so fatally unspecific that none of the revisions can be considered reasonable.[78] In the view of the Administrative Law Judge, that attack is too broad and outdistances the record in this rulemaking proceeding.

74. As to whether a rule is impermissibly vague, the Minnesota Supreme Court has instructed that a rule "should be upheld unless the terms are so uncertain and indefinite that after exhausting all rules of construction it is impossible to ascertain legislative intent."[79] Stated another way, a regulation is not impermissibly vague merely because its terms could have been drafted with greater precision.[80]

75. On this record we have the Department's claims that the work encompassed by the existing and proposed job classifications is "obvious" from the name of the classification and industry custom and usage,[81] and the concurrence of at least one stakeholder Union. Commentator Paul W. Iversen, writing on behalf of the International Union of Operating Engineers Local 49, asserts that as to the power equipment job classifications "[i]t is self-evident from the name of the job classification what the power equipment operator does."[82]

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[78] *See, Initial Comments of Michael L. McCain*, at 3-7 (August 14, 2008); *Initial Comments of Philip Raines*, at 1-2 (August 13, 2008).

[79] *In re N.P.*, 361 N.W.2d 386, 394 (Minn. 1985).

[80] *Compare generally, State v. Normandale Properties, Inc.,* 420 N.W.2d 259, 262 (Minn. App.), *review denied* (Minn. 1988).

[81] SONAR at 18 ("The definitions of the various job classifications for power equipment operators and truck drivers are obvious … from the name and well known from custom and usage in the construction industry and labor agreements").

[82] *See, Rebuttal Comments of Paul W. Iversen*, at 3 (August 21, 2008).

76. By contrast, the challenge of Messrs. McCain and Raines to all of the proposed classifications, does not, with two exceptions discussed below, detail the infirmities of Major Job Classifications proposed for modification in this rulemaking proceeding. For example, Mr. McCain submitted into the record detailed evidence as to the lack of definition for the Job Classification "Carpenter."[83] In this rulemaking, however, the Department only proposes to revise the number associated with the Carpenter classification, from 404 to 704; and does not undertake any substantive change to the scope or depth of this classification.[84]

77. Additionally, it may well be that Classification 306 ("Grader or motor patrol"), for example, is fatally unspecific and vague – as McCain and Raines argue in their broadside against all of the new classifications – but that proposition does not follow from cited evidence that the classification for "Carpenter" lacks the required precision. In such a circumstance, the broad, but largely unspecific challenge does not overcome the record evidence that the scope of at least some of the classifications is obvious from their bare titles.[85] For that reason, a finding that all of the proposed classifications are defective is not warranted on this record.

78. Raising a different claim, Dale Zoerb, President of Building Restoration Corporation, urged the Department to develop two new classifications for "Tuckpointing" and "Caulkers" – classifications which do not now appear among the Special Crafts Master Job Classifications. In reply, the Department stated that it is now undertaking a parallel rulemaking proceeding, under which a broader set of revisions to the Special Crafts classifications will be made, and that the addition of new classifications is better directed to those proceedings. The reply of the agency in this regard is reasonable.

Minn. R. 5200.1100 - Classification 110 (Survey Field Technician)

79. The Department proposes to add as Classification 110 the following new Major Job Classification:

> Survey field technician (operate total station, GPS receiver, level, rod or range poles, steel tape measurement; mark and drive stakes; hand or power digging for and identification of markers or monuments; perform and check calculations; review and understand construction plans and land survey materials).[86]

While there were a number of commentators submitting comments on this proposed rule, the stakeholder comment can be grouped into two principal critiques: First, the

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[83] *See, Initial Comments of Michael L. McCain*, at 4-5.

[84] *Proposed Permanent Rules Relating to Prevailing Wages*, Revisor No. RD3697 at 13. Similarly, other commentators attacked the underlying substance of Major Job Classifications which the Department only proposed to renumber in this proceeding. Those challenges are likewise not well placed.

[85] *See,* SONAR at 18; *Rebuttal Comments of Paul W. Iversen*, at 3.

[86] *Proposed Permanent Rules Relating to Prevailing Wages*, Revisor No. RD3697 at 4.

stakeholders assert that the rule does not make clear that professional surveyors working at the construction site are beyond the reach of the proposed rule;[87] and second, the rule will have distorting effects upon future wage surveys because it combines into a single job classification tasks that are commonly distributed among employees of very different experience levels and pay rates.[88]

80. To these critiques, the agency's reply is two-fold. First, it specifically disclaims that the duties included in the classification are those that are performed by registered land surveyors (or the surveyors' supervisory personnel) and asserts that this disclaimer is included in the Department's Statement of Need and Reasonableness underlying the proposed rule.[89] While the latter point is certainly true, because any final rule is certainly to be in wider circulation than copies of the June 19, 2008 SONAR, in the view of the Administrative Law Judge the Department should consider adding terms such as "non-licensed," "non-registered," or "non-supervisory" to the regulatory text so as to make its stated intentions clear. Such a revision would not be beyond the scope of the regulation as originally proposed.

81. Second, while acknowledging that there may be differences in levels of experience (and corresponding pay) among workers performing survey functions, the Department asserts that because these workers use similar equipment, and perform similar tasks, "[t]hese nuances are hard to detect in the field in an enforcement setting."[90] The Department apparently does not quarrel with the view that a single classification may have a distorting effect on the modal rate that is later mandated for this work – arguing that a single classification is reasonable because the Department's survey and audit techniques cannot discern the differences that the stakeholders now describe. While the Department's claim creates some tension with the direction from the Legislature that it ascertain prevailing wage rates for "all trades and occupations" before the state asks for bids on covered projects,[91] the fact that the Department cannot detect differences among surveyors of different experience levels provides some rationale for its regulatory choice.

82. A revision to this rule part that the Department may wish to consider is segmenting the overall class of surveyors based upon a specified number of years of experience. Such a segmenting could respond to the comments made by

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[87] *See, e.g., Initial Comments of the Associated Gen. Contractors of Minn.*, at 1 (August 11, 2008); *Initial Comments of Minnesota Soc'y of Professional Eng'rs,* at 1-2 (August 14, 2008); *Initial Comments of Diane S. Halverson,* at 1 (August 8, 2008).

[88] *See, e.g., Initial Comments of Minnesota Soc'y of Professional Eng'rs,* at 1-2; *Initial Comments of State Representative Tim Faust*, at 1 (August 13, 2008); *Initial Comments of Douglas G. Rude*, at 1 (August 13, 2008).

[89] SONAR at 20; *Department's Initial Comments*, at 6 (August 14, 2008); *Department's Rebuttal Comments*, at 5 (August 21, 2008).

[90] *Department's Initial Comments*, at 6.

[91] *Compare, e.g.,* Minn. Stat. § 174.43, subd. 4 (2006).

affected stakeholders and would not later be beyond the scope of the regulation as originally proposed.

83. The classification proposed by the Department, however, is needed and reasonable.

Minn. R. 5200.1100 - Classification 111 (Traffic Control Person)

84. The Department proposes a new master job classification to include workers who install temporary traffic control systems such as cones, barriers and flashing lights during covered construction projects.[92]

85. The Department proposed to establish the following new Classification, as Number 111: "Traffic control person (temporary signage)."

86. As it was with the classification of survey field technicians, above, stakeholders commenting upon the proposed addition broke along various lines – with some opposing the addition of a new category;[93] others asserting that it was not sufficiently segmented so as to account for different levels of job experience;[94] and still others favoring the proposed change.[95]

87. While the comments from both contractor and labor groups suggest that there may be later confusion as to the proper classification of workers performing these tasks, the classification responds to recent changes in contracting practice[96] and is needed and reasonable.

Minn. R. 5200.1100 - Classification 112 (Quality Control Tester)

88. The Department proposes a new master job classification to include workers who "perform quality tests in the field or covered offsite facilities on construction materials."[97] By way of a later amendment, the Department proposes to limit the reach of such classification to those projects in which MnDOT has retained the quality assurance professionals to review quality control services by the contractor.[98]

89. As amended, Classification 112 would read:

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[92] SONAR at 20-21.

[93] *See, Initial Comments of Laborers Dist. Council of Minn. and N. Dakota*, at 3 (August 14, 2008).

[94] *See, Initial Comments of Tim Lewis,* at 4 (August 14, 2008); *Rebuttal Comments of Tim Lewis,* at 2 (August 21, 2008).

[95] *See, Initial Comments of the Associated Gen. Contractors of Minn.*, at 1; *Rebuttal Comments of MnDOT's Office of Construction and Innovative Contracting*, at 7 (August 21, 2008).

[96] SONAR at 21.

[97] *Id*.

[98] *Department's Initial Comments*, at 2.

"Quality control tester (field and covered off-site facilities; testing of aggregate, asphalt and concrete materials; limited to MnDOT Highway and Heavy construction projects where MnDOT has retained Quality Assurance professionals to review and interpret the results of quality control testers services provided by the contractor."

90. This narrowing of the rule would presumably address the objection raised by the Associated General Contractors of Minnesota that the proposed classification would purportedly reach specialty vendors that perform this kind of work under separate contracting arrangements.

91. As revised, the proposed classification is needed and reasonable and is not beyond the scope of the regulation as originally proposed.

Minn. R. 5200.1100 - Classification 203 (Landscaping Equipment)

92. The Department proposes a new master job classification to include workers who use various types of power equipment and machinery to landscape surfaces during construction projects.[99]

93. The new Classification 203 would read:

"Landscaping equipment, includes hydro seeder or mulcher, sod roller, farm tractor with attachment, specifically seeding, sodding or plant, and two-framed forklift (excluding front, posi-track, and skid steet loaders), no earthwork or grading for elevations."

94. The Laborers Council opposed the development of this new classification on the grounds that it would later cause confusion as to whether workers should be assigned to existing Classification 103 (Laborer, Landscaping) or the newly-developed Classification 203.[100] While it does not appear that the Department addressed this point either in its SONAR, or in its later post-hearing comments, because the agency references the worker's operation of certain specialized equipment in Classification 203, it cannot be said that it is impermissibly vague or irrational. The proposed classification is needed and reasonable.

Minn. R. 5200.1100 - Classification 205 (Truck for Pavement Marking or Removal)

95. The Department proposes a new master job classification to include workers who are part of a one or two person operation that uses a truck for pavement marking or removal.

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[99] SONAR at 21.

[100] *See, Initial Comments of Laborers Dist. Council of Minn. and N. Dakota*, at 3.

96. The new Classification 205 would read: "Truck for pavement marking or removal (one or two person operators)."

97. Various stakeholders, representing both labor and industry groups, complained that the proposed rule was too imprecise and could lead to difficult classification disputes with the revised Classification 715, relating to painters.[101] The Department's reply, in its post-hearing submissions, is apparently that the use of a truck in pavement painting makes this labor sufficiently different from painting without the use of a truck, such that a separate job classification is warranted. As noted above, because the agency references the worker's operation of certain equipment in proposed Classification 205 (namely, a truck), and this distinction is in accord with the applicable collective bargaining agreements, it cannot be said that the distinction between Classifications 205 and 715 is not perceptible or rational.[102]

98. More problematic for the Department is that, as pointed out by the International Brotherhood of Teamsters Locals 160 and 346, neither the proposed rules nor the accompanying materials explain why a truck driver operating pavement truck should be classified separately from other types of truck driving. While the Department clearly intends to include such drivers in the proposed Classification,[103] the affirmative presentation of facts from the agency simply does not address this point. Moreover, the text of the classification itself contains so few descriptive words, that a basis for distinguishing Classification 205 from the separate, general class of truck driving,[104] if there is such a distinction, cannot be inferred.

99. The Department has not established that the proposed classification is needed and reasonable.

100. At a minimum, the Department will need to resolve the apparent conflict with Minn. R. 5200.1040 (C), in any later revisions of Minn. R. 5200.1100 - Classification 205.

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[101] *See, e.g., Initial Comments of Tim Lewis,* at 4; *Initial Comments of the International Union of Painters & Allied Trades, Dist. Council 82*, at 3; *Rebuttal Comments of AAA Striping Service Co.,* at 2-3 (August 21, 2008).

[102] SONAR at 21.

[103] *Id.* at 24 ("The truck for pavement marking or removal is not a particularly new piece of equipment …. Generally, has two operators, *one to drive the truck and one to operate the equipment mounted on the truck for marking the pavement*, but some units are driven by the same person operating the spray equipment") (emphasis added).

[104] *Compare,* Minn. R. 5200.1040 (C) (2007).

Minn. R. 5200.1100 - Classification 301 (Truck and Crawler Cranes)

101. The Department proposes a new master job classification to include workers who operate large capacity cranes that perform "the specialized work of pile driving, sheeting, caisson work, and rotary drilling and boring."[105]

102. The new Classification 301 would read: "All truck and crawler cranes 50 tons and over and doing pile driving, sheeting, caisson work, rotary drilling, and boring."

103. Joseph Ryan, testifying on behalf of the International Union of Operating Engineers Local 49 (and later, Paul W. Iversen, submitting comments on behalf of Local 49), asserted that a better dividing line for the scope of this classification would be equipment with a lifting capacity in excess of 40 tons, instead of the 50-ton standard referenced in the proposed rule. Specifically, Mr. Iversen argued that a classification that extended to equipment with a lifting capacity of 40 tons and greater would be better aligned to the applicable collective bargaining agreements than the proposed standards.[106]

104. The rationale expressed by the Department in the SONAR asserts:

> The change is necessary because these modern very large cranes doing these specialized tasks require high levels of skills and experience. The change is reasonable because the pay for operators of these particular cranes doing these tasks is higher and the operators require "certification" under Laws of Minnesota, [2005], Chapter 87, §1 (Minn. Stat. § 182.6525 (2007).[107]

105. Regrettably, however, the requirements of Minn. Stat. § 182.6525 do not provide a rationale for limiting the classification to equipment with a lifting capacity of 50 tons or greater. The certification requirements in the referenced statute apply to individuals operating cranes with a lifting capacity of five tons or more – presumably, obliging valid certificates for operators of both 40-ton cranes and 50-ton cranes alike.

106. Because the affirmative presentation of facts from the agency does not address why its line of demarcation was chosen, and the text of the classification itself contains so few descriptive words, a basis for the 50-ton limitation on the classification cannot be inferred.

107. The Department has not established that the proposed classification is needed and reasonable.

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[105] SONAR at 26.

[106] *See, Initial Comments of Paul W. Iversen*, at 1 (August 14, 2008).

[107] SONAR at 26.

108. At a minimum, the Department will need make an affirmative presentation of facts in support of whatever lifting capacity limitation may be chosen, in any later revisions of Minn. R. 5200.1100 - Classification 301.

Minn. R. 5200.1100 - Classification 386 (Vibratory Driver or Extractor)

109. The Department initially proposed a new master job classification to include workers who operate power equipment that is commonly used in pile driving or sheeting operations.[108] By way of a later amendment, the Department proposes to add the classification text as an example of the type of duties undertaken by workers under newly-renumbered Classification 716 – "Piledriver."[109]

110. As amended, Classification 386 would read: "Piledriver, including vibratory driver or extractor for piling and sheeting operations."

111. Because the record establishes that the work undertaken within this Classification has been undertaken by workers denominated as Piledrivers in the past, and such a classification is in accord with applicable collective bargaining agreements, the proposed revisions are needed and reasonable. Moreover, the proposed revisions to newly-renumbered Classification 716 are not beyond the scope of the regulation as originally proposed.

Minn. R. 5200.1100 - Classification 723 (Terrazo Workers / Marble Setters)

112. The Department proposes to revise the Classification for Terrazo workers by adding two words "marble setters."[110]

113. The renumbered and expanded Classification 723 would read: "Terrazo workers / marble setters."

114. Commentator Michael L. McCain, of the law firm of Seaton, Beck & Peters, asserts that the two word addition urged by the Department is not sufficiently specific to describe what marble work is included in the newly renumbered and expanded job classification.[111]

115. By way of reply, the Department contends that the comments made by Mr. McCain "do not relate to any particular new class or amendment to an existing class proposed in these rules."[112]

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[108] SONAR at 33.

[109] *Department's Rebuttal Comments*, at 7-8; *Compare also, Initial Comments of Dennis Perrier and Burt Johnson,* at 1-2 (August 12, 2008); *Proposed Permanent Rules Relating to Prevailing Wages*, Revisor No. RD3697 at 13.

[110] *Proposed Permanent Rules Relating to Prevailing Wages*, Revisor No. RD3697 at 14.

[111] *See, Initial Comments of Michael L. McCain*, at 8-10.

[112] *Department's Rebuttal Comments*, at 8.

116. Because the affirmative presentation of facts from the agency does not detail the scope of work in the classification performed by marble setters,[113] and the proposed two-word addition to the classification contains so few descriptive words, that after exhausting all rules of construction it is not possible to ascertain the intent of the regulation.

117. In a circumstance in which a proposed rule fails to provide a reasonable notice of what standards will be applied, the proposed rule is defective.[114]

118. The Department has not established that the proposed classification is needed and reasonable.

119. At a minimum, in any later revisions of Minn. R. 5200.1100 - Classification 723, the Department will need to include enough description of the work duties of "marble setters" so that regulated parties will have fair notice of what standards will be applied under the Prevailing Wage Act.

Minn. R. 5200.1100 - Classification 725 (Tile Finishers)

120. The Department proposes a new master job classification "Tile finishers" so as to distinguish these workers from the broader duties of "tile setter."[115]

121. The new Classification 725 would read: "Tile finishers."

122. As with Classification 723, discussed above, Mr. McCain, of the law firm of Seaton, Beck & Peters, asserts that the proposed two word classification title is not sufficiently specific to describe what work is included in the new classification.[116]

123. Likewise, as noted above, the Department contends that the comments made by Mr. McCain "do not relate to any particular new class or amendment to an existing class proposed in these rules."[117]

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[113] *Compare,* SONAR at 50 ("The new language is necessary to clarify that the scope of work in the classification includes the work performed by marble setters. The change is necessary for enforcement purposes to assure prevailing wage coverage for marble setters. The change to the classification is reasonable because the marble setters perform work similar to Terrazzo workers and the work requires similar skill and experience to perform").

[114] *See, In the Matter of Proposed Amendments to Rules Governing Apprenticeship Wages,* OAH Docket No. 7-1900-17022-1, slip op. at 36 (2006) (http://www.oah.state.mn.us/aljBase/190017022.rr.htm).

[115] *See,* SONAR at 50-51; *Proposed Permanent Rules Relating to Prevailing Wages*, Revisor No. RD3697 at 14.

[116] *See, Initial Comments of Michael L. McCain*, at 8-10.

[117] *Department's Rebuttal Comments*, at 8.

124. In the SONAR however, the Department does make a meaningful set of distinctions. It declares:

> The scope of work of a tile finisher is not as broad as tile setter. Tile finisher work includes mixing grout, grouting and surfacing all types of tile, cutting tile, and sealing surfaces. Tile setters set the tile, repair and patch tile, layout the work, install substrates; install showers, countertops, floors, and steps; lay quarry tile; install ceilings, mantels, hearths, swimming pools, domes, columns, and arches; and other work not performed by tile finishers.[118]

Regrettably, however, because the Department's SONAR is not promulgated as a rule, and will never be binding as a regulation, it does not operate to either define or limit the tile finisher classification.

125. Accordingly, because the proposed two-word addition to the classification contains so few descriptive words, after exhausting all rules of construction it is not possible to ascertain the intent of the regulation, the revision proposed by the agency is not reasonable.

126. With that said, a regulatory cure appears to be within easy reach. By modifying the classification with the limiting terms that are now set forth in SONAR, it could provide the missing detail. Such a modification would be in line with the other modifications it has made in this proceeding (*compare generally*, Classifications 110 and 203 and 328) and would not be beyond the scope of the regulation as originally proposed.

CONCLUSIONS

1. The Department of Labor and Industry gave proper notice of the hearing in this matter.

2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule, with the exception noted in Finding 30, which was found to be a harmless error.

3. The Department has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50 (i) and (ii), except as noted in Findings 71, 99, 107, 118 and 125.

4. The Department has demonstrated the need for and reasonableness of the other portions of the proposed rules by an affirmative presentation of facts in the

[118] *See,* SONAR at 50-51.

record within the meaning of Minn. Stat. §§ 14.14, subd. 4 and 14.50 (iii), except as noted in Findings 71, 99, 107, 118 and 125.

5. The modifications to the proposed rules that were offered by the Department after publication in the *State Register* do not make the rules substantially different from the proposed rule within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

6. Any Findings that are more properly characterized as Conclusions are hereby adopted as such and incorporated by reference. Any Conclusions that are more properly characterized as Findings are hereby adopted as such and incorporated by reference.

7. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude, and should not discourage, the Department from further modification of the proposed rules based upon an examination of the public comments; provided that the rule finally adopted is based upon the facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed amended rules be adopted, except as otherwise noted.

Dated: September 22, 2008.

/s/ Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

It bears noting that, at different times over the past decade, both the Legislative Auditor and the Minnesota Court of Appeals have urged the Department to undertake rulemaking in order to close gaps in the Prevailing Wage Act regulations.[119]

For its part, the Department has responded in this proceeding, and in others, that it is willing to undertake such rulemaking and that it does so to both provide guidance to workers, contractors and audit personnel, and to avoid the burden of later enforcement litigation.[120] Indeed, as noted above, the Department projects that its revisions to the prevailing wage rules will result in lower enforcement-related costs.

On this record, however, it appears that a key stumbling block to realization of the agency's stated goals is the Department's claim that the work that is encompassed by the existing and proposed job classifications is "obvious" from the name of the classification and industry custom and usage.[121] While this view is not demonstrably irrational – the legal standard that is applicable in rulemaking proceedings – it is certainly a minority viewpoint; with representatives of labor, industry and sister government agencies frequently disagreeing with the Department on this score.[122] Moreover, as our collective experience has shown, the claim that the prevailing wage

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[119] *See, e.g., Prevailing Wages – Evaluation Report*, at 63 (Office of the Legislative Auditor, 2007) ("The source of the problem is that the rules promulgated by the Department of Labor and Industry do not define the job responsibilities of the various job classes for either commercial or highway/heavy construction. In particular, there is no definition of the responsibilities of common or skilled laborers in comparison to those of skilled tradesmen…. The Department of Labor and Industry should promulgate rules that define the job responsibilities of workers in the various construction job classes listed in the department's rules") (http://www.auditor.leg.state.mn.us/ped/pedrep/prevailingwages.pdf); *L&D Trucking v. Minnesota Dep't. of Transp*., 600 N.W.2d 734, 737 (Minn. App. 1999) ("This court is not unmindful of the problems that case-by-case enforcement of the prevailing-wage law creates for contractors who want to bid on state highway projects. We therefore encourage formal rulemaking by the Minnesota Department of Labor and Industry or other appropriate agency ….").

[120] *See,* SONAR at 7, 9, 13 and 14; *accord, Proposed Amendments to Rules Governing Prevailing Wages: Trucking, Minnesota Rules, Chapter 5200,* OAH Docket No. 12-1900-13145-1, slip op. at 9 (2001) (http://www.oah.state.mn.us/aljBase/190013145.rr.htm); *compare also, Initial Comments of MnDOT's Office of Construction and Innovative Contracting*, at 4 (August 14, 2008).

[121] *See,* SONAR at 18 ("The definitions of the various job classifications for power equipment operators and truck drivers are obvious … from the name and well known from custom and usage in the construction industry and labor agreements"); *compare also, In the Matter of the MnDOT Detroit Lakes Regional Headquarters, Construction Project Number 00TZ1791B*, OAH Docket No. 8-3001-17706-2 (2008) (http://www.oah.state.mn.us/aljBase/300117706-finrpt.htm) ("MnDOT argues that the correct labor classifications for particular tasks were known to Comstock on the date that the underlying contract was signed because Comstock had a listing of the Major Job Classifications, a copy of the contract Statement of Work and – presumably – was a knowledgeable contractor").

[122] *See, e.g.,* SONAR at 9; *Initial Comments of Tim Lewis,* at 4; *Initial Comments of the International Union of Painters & Allied Trades, Dist. Council 82*, at 3; *Initial Comments of Laborers Dist. Council of Minn. and N. Dakota*, at 3; *Initial Comments of the Hennepin County Attorney's* Office, at 3; Rebuttal *Comments of AAA Striping Service Co.,* at 2-3.

provisions are clear on their face is not one that has been sustained by tribunals when other, more stringent legal standards apply.[123]

Accordingly, as the Department considers possible cures to the rulemaking defects that have been identified in this proceeding, and methods by which it can meet the needs of the stakeholders who will rely upon any later rules, one conclusion is clear: Additional detail on the boundaries between and among Major Job Classifications would benefit all concerned.[124]

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[123] *See, e.g., Sa-Ag, Inc. v. Minnesota Dep't of Transp.*, 447 N.W.2d 1, 5 (Minn. App. 1989) (the court disagreed with the Department of Transportation that for purposes of the prevailing wage statute, the statutory term, "substantially in place," was susceptible to only one meaning; and held that the Department of Transportation "engaged in rulemaking by issuing the addendum which interprets the term"); *In the Matter of the MnDOT Detroit Lakes Regional Headquarters, supra* ("Because the prevailing wage classification rules do not include sufficient language for readers to determine its intended scope, they may not form the basis for a monetary claim by MnDOT against Comstock").

[124] *Compare generally, Proposed Amendments to Rules Governing Prevailing Wages: Trucking, Minnesota Rules, supra* at 46, ("Agencies should be as clear as possible about the laws they enforce; nothing is accomplished by being coy") (http://www.oah.state.mn.us/aljBase/190013145.rr.htm).